STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF CIVIL RIGHTS,

Plaintiff-Appellee,

and

BURNETTE BURNSIDE,

Appellee,

v

FASHION BUG OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
February 19, 2004

No. 240325
Wayne Circuit Court
LC No. 01-116726-AA

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

In this employment discrimination action brought under the Civil Rights Act ("CRA"), MCL 37.2101, *et seq*., respondent appeals by leave granted from an opinion of the circuit court affirming the decision of the Michigan Civil Rights Commission ("MCRC"), which found that respondent wrongfully terminated claimant. Although the trial court affirmed the commission's conclusion on liability, the court reversed the commission's ruling on the issue of damages, concluding that claimant was entitled to $44,981 in back wages, $20,000 for emotional distress, and $40,282.50 in attorney fees, as opposed to the $7,726 in back wages, $10,000 for emotional distress, and $33,750 in attorney fees the commission thought was appropriate. On appeal, respondent takes issue with the court's conclusions on liability and damages. We affirm.

Claimant, Burnette Burnside, worked as a sales associate at respondent's Detroit store. While claimant was shopping with her sister, Benita Withers, at respondent's Warren location, she attempted to exchange a blouse and a blazer that she had purchased using her employee discount. Although claimant was able to exchange the blouse, she could not locate a blazer in an appropriate size. Claimant also purchased a pleated skirt. When claimant asked respondent's manager, Teresa Jawoszek, to leave the skirt on the hanger, Jawoszek responded, "You people hang your clothes on hangers?" Claimant and her sister found this statement to be offensive and racially motivated; claimant and her sister are black, and Jawoszek is white.

When Withers asked Jawoszek to explain what she meant when she said "you people," Jawoszek replied, pointing at Withers and claimant, "you are all the people" and, then gesturing with her hands around the room and at the customers and the employees on both sides of the counter, said "we all are individuals." Eventually Jawoszek gave claimant a hanger for her skirt, and claimant and Withers left. Withers returned several days later, and attempted to return claimant's blazer. Without a receipt, Withers was not allowed to return the items by Jawoszek. Withers lodged a complaint against Jawoszek with respondent's headquarters for failing to accept the return, although the veracity of that allegation was challenged. Respondent's policies permit returns without receipts from customers, but not from employees. During the course of the investigation of Withers' complaint, Jawoszek alleged that claimant violated the policy by returning merchandise without a receipt. After conducting an investigation, Deborah Kerins, respondent's regional manager, terminated claimant.

This Court reviews the circuit court decision under the clearly erroneous standard, substituting our judgment for the circuit court only where, on review of the record, this Court is left with the definite conviction that a mistake has been made. *Dep't of Civil Rights ex rel Johnson v Silver Dollar Café (On Remand)*, 198 Mich App 547, 549; 499 NW2d 409 (1993). The circuit court was unable to receive additional evidence, but reviewed the commission decision de novo. *Id*. at 548-549.

Respondent takes issue with the trial court's conclusion that claimant established a prima facie case of racial discrimination. In this case, the trial court concluded that both claimant and Jawoszek were accused of violating the same company policy regarding returns and exchanges. Claimant, as an employee, was accused of returning or attempting to return merchandise without a receipt, and Jawoszek was accused of failing to accept the return of merchandise from Withers, a customer. The trial court continued that both parties were subject to the same rules, and that the same investigatory and disciplinary procedures would apply to both. However, the trial court opined that the allegations were not investigated in the same way. The trial court observed that the allegations against Jawoszek were handled by Kerins seeking Jawoszek's statement, and Jawoszek obtaining the statements of other white employees who were present at the time. Kerins never spoke with claimant or her sister. However, in investigating the allegations against claimant, Kerins only spoke with Jawoszek. Moreover, Kerins terminated claimant, and did not discipline Jawoszek.

Respondent does not challenge these factual findings. Rather, respondent argues that, as a matter of law, these facts do not allow claimant to establish a prima facie case of racial discrimination. "To make a prima facie case of discrimination under a theory of disparate treatment, it must be shown that a plaintiff was a member of the class entitled protection and was treated differently from members of a different class for the same or similar conduct." *Merillat v Michigan State University*, 207 Mich App 241, 247; 523 NW2d 802 (1994). Respondent's argument focuses on whether the second element of a prima facie case – whether claimant demonstrated that she was treated differently from members of a different class for a similar activity – was met. However, the issue of whether two parties are similarly situated is a factual question, which is generally resolved by a jury. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 652; 513 NW2d 441 (1994).

Here, the trial court concluded that claimant and Jawoszek were similarly situated, both subject to the return/exchange policy. The fact they were treated differently for allegedly

violating the policy was sufficient to give rise to a prima facie case. The trial court noted that there appeared to be only one policy related to investigation of allegations of violating store policy, regardless of whether the allegations involved managers or nonmanagerial employees, and that in that respect, claimant and Jawoszek were considered comparables. Accordingly, the "relevant aspect" of claimant's and Jawoszek's employment situation – that they both are subject to the same store policies regarding investigations and discipline – is the same. We cannot conclude that the trial court's decision in this regard was clearly erroneous. *Silver Dollar Café*, *supra*.

Under the burden shifting framework of *McDonnell Douglas*, the establishment of a prima facie case creates the presumption of discrimination, requiring the defendant to articulate "'legitimate non-discriminatory reason'" for the plaintiff's termination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). The purpose of this explanation serves to overcome the presumption of discrimination, shifting the burden back to the plaintiff to demonstrate that the proffered explanation was merely pretextual. *Id.* at 173-174. Here, respondent offered that claimant was terminated because she violated the store's policy by attempting to exchange clothing without a receipt.

The commission concluded that this explanation was pretextual because, as it found, claimant had not, in fact, violated store policy inasmuch as she actually had a receipt for the clothes she sought to return and exchange. The trial court agreed with the commission that claimant's "prima facie case strongly indicates race played a part in the decision to terminate plaintiff. As noted above, Fashion Bug, through Kerins, employed racially discriminatory methods of investigation which led it to terminate [claimant]." Moreover, the trial court agreed with the commission that plaintiff never actually violated the policy because she never exchanged merchandise without a receipt. Finally, the trial court reasoned that the use of the "you people" language by Jawoszek could be construed as racially derogatory. The trial court reasoned that use of this language by Jawoszek could explain why Jawoszek complained about claimant, which initiated the investigation process, which ultimately led to claimant's termination.

Respondent first argues that the conclusion of the commission and the trial court that claimant did not violate respondent's policy was not supported by the evidence. As previously stated, our review of this issue is not de novo. *Silver Dollar Café*, *supra*. The commission as the reviewing body was entitled to make a de novo decision on all questions of fact and law, see *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 366-367; 395 NW2d 195 (1986), and the trial court's review of that decision is de novo. *Silver Dollar Café*, *supra*. Respondent points out that, while claimant did not successfully return items without a receipt, there is no dispute that claimant attempted to do so. The commission and trial court were able to determine that claimant went to respondent's store to exchange her blouse and blazer. Claimant found the blouse that she wanted, but could not find the blazer in the right size. Therefore, claimant exchanged the blouse, but kept her blazer; claimant had the receipt for the blouse. This evidence supports the conclusion of the trial court and the commission that claimant did not violate the policy. Actually, what is unsupported by the evidence is respondent's assertion that claimant attempted to violate respondent's policy. One of the ways a plaintiff may show that a defendant's explanation or the plaintiff's termination is a pretext is by showing that that reason had no basis in fact. *Feick v Monroe County*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

Here, by showing that respondent's explanation has no basis in fact supports the conclusion that respondent was racially motivated in terminating claimant.

Respondent next argues that the decision to terminate claimant was made in good faith, and was a matter of business judgment that should not be second-guessed. This argument ignores the conclusion that the investigation and disciplinary methods employed by respondent were racially disparate. Although Kerins may well have believed claimant violated the policy, that fails to explain why the allegations against claimant were investigated only by talking to white employees, and why claimant was terminated, when allegations directed at Jawoszek were not investigated, and Jawoszek was not punished. Respondent's reasoning is flawed, in that all employment decisions can be said to involve "business judgment," but this fact alone does not insulate an employer from liability for using racially based motives for making such decisions.

Respondent also argues that the trial court erred when it relied on Jawoszek's "you people" language as a basis for concluding respondent's reason for terminating claimant was pretextual. Respondent asserts that the language used by Jawoszek was irrelevant because it was Kerins, and not Jawoszek, who ultimately decided to terminate claimant. In looking at the relevancy of comments which may or may not amount to direct evidence of discrimination, this Court looks at whether the "proffered comment was made by an agent of the employer involved in the decision to terminate plaintiff's employment." *Krohn v Sedgwick James of Michigan, Inc,* 244 Mich App 289, 300; 624 NW2d 212 (2001). Jawoszek was an agent of the decisionmaker who decided to terminate plaintiff's employment. Respondent fails to establish how the trial court's consideration of these comments amount to clear error warranting reversal. *Silver Dollar Café, supra.*

We do not second guess the conclusion of the trial court and commission, as factfinder, that claimant's prima facie case was sufficiently strong to conclude that respondent's decision to terminate claimant was racially motivated. The reasons for finding a prima facie case can also serve to rebut a defendant's proffered nondiscriminatory explanation. *Town v Michigan Bell Telephone Co,* 455 Mich 688, 695; 568 NW2d 64 (1997). Moreover, as further evidence to rebut respondent's explanation, the trial court and the commission concluded that respondent's explanation was untrue. Finally, the trial court considered the comments made by Jawoszek to determine that the explanation was pretextual. The trial court did not err in so concluding. *Silver Dollar Café, supra.*

Respondent next argues that pursuant to petitioner departments own administrative rules, the commission lost jurisdiction of this case because it was dismissed in 1992, and claimant failed to request reconsideration in a timely manner. The trial court examined the rules of the commission and concluded: "the Department's dismissal was predicated upon an error of its own making, namely, failing to send notices to Burnside's correct address." On that basis, the court further stated, "the Department and Commission were correct in concluding that Burnside had established a sufficient and adequate basis for reopening her case."

Respondent concedes that Rule 37.17 allows the department to consider, on its own motion, whether to reopen a case that has been dismissed but apparently argue that the "justice" exception should not be read so as to allow the commission to disregard the reconsideration period of Rule 37.7(1). Respondent's interpretation of the interplay between these two rules is flawed. Rule 37.7(1) requires a claimant to seek reconsideration of a commission's refusal to

issue a charge within 30 days. Rule 37.17 allows the commission to reopen any proceeding when "justice so requires." We conclude that the trial court aptly applied the pertinent statutory construction rules. Here, the "justice" provision of Rule 37.17 is an exception to the general rule of Rule 37.7(1).

Respondent also asserts that claimant failed to comply with the time requirements of appeal to the circuit court as set out in MCL 37.2606, which permits an appeal to the circuit court within thirty days "after a copy of the order of the commission is received." Respondent takes issue with the fact that claimant's initial appeal to the circuit court was not in the proper form, as set out in MCR 7.105(C) and thus should be deemed to be untimely. The circuit court allowed claimant leave to amend her pleadings so they conformed to the court rule. However, although the initial filing was within the thirty-day limit, the second filing submitted by claimant was not.

Respondent agrees that claimant had until May 30, 2001, to file a circuit court petition. On May 22, 2001, claimant filed an application for leave to file a claim of appeal with the trial court. This request for permission was filed within the time limits. MCR 2.108(E) provides that:

> A court may, with notice to the other parties who have appeared, extend the time for serving and filing a pleading or motion or the doing of another act, if the request is made before the expiration of the period originally prescribed. After the expiration of the original period, the court may, on motion, permit a party to act if the failure to act was the result of excusable neglect. However, if a rule governing a particular act limits the authority to extend the time, those limitations must be observed. MCR 2.603(D) applies if a default has been entered.

Because the request was filed within the time period, the court had discretion to extend the time period. *Id.* Respondent fails to show how the trial court's decision was an abuse of discretion.

Finally, respondent takes issue with the trial court's conclusion on the issue of damages. The trial court awarded claimant back wages in the amount of $44,981, emotional damages in the amount of $20,000, and interest on those amounts from the time claimant filed her charge of discrimination, and attorney fees in the amount of $40,282.50. On appeal, respondent takes issue with each of these findings. The commission and trial court reviewed this issue de novo, but we are limited to reviewing the damages for clear error. *Silver Dollar Café, supra*. In light of the limited standard of review, we cannot conclude that the trial court's decision was clearly erroneous.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood